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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20541
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In the Matter of)

Amendment of the Commission's)
Rules Regarding the 37.0-38.6 GHz)
and 38.6-40.0 GHz Bands)

ET Docket No. 95-183
RM-8553

Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding, 37.0-38.6 GHz)
and 38.6-40.0 GHz)

PP Docket No. 93-253

To: The Commission

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PETITION FOR RECONSIDERATION

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Dated: January 16, 1996

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SUMMARY

Commco, L.L.C., PLAINCOM, INC., and Sintra Capital Corporation, (collectively referred to as "Petitioners"), pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. §1.429, request that the Federal Communications Commission ("FCC" or "Commission") reconsider that portion of its Notice of Proposed Rulemaking and Order, adopted December 15, 1995 in the above-captioned proceeding (hereinafter "39 GHz Order") imposing an interim freeze on the processing of mutually exclusive applications, including amendments thereto, pending as of November 13, 1995, to establish new facilities in the 38.6 - 40 GHz (hereinafter "39 GHz") band.

The interim freeze is a prima facie violation of Congress' prerequisites for competitive bidding, and the FCC's own rules and previously operative 39 GHz licensing policy. Moreover, in adopting the interim freeze, the Commission has engaged in an impermissible retroactive rulemaking. As a result, Petitioners have been deprived of both substantive and procedural due process rights.

It is well settled that rescission of an agency rule -- even if temporary -- is subject to the same standard of review as promulgation of a rule. Public Citizen v. Steed, 733 F.2d 93, 98 (D.C. Cir. 1984). The FCC's suspension of its rules without notice and comment, and in contravention of the requirements of Sections 309(j)(6)(E) and 309(j)(7)(B) of the Communications Act of 1934, as

amended, cannot withstand judicial review.

Therefore, as detailed herein, the Commission's interim 39 GHz processing freeze must be vacated. At a minimum, if the Commission believes it can reconcile its freeze with rulemaking requirements, it must issue a new public notice, clarifying that its freeze on the acceptance and processing of amendments which eliminate mutual exclusivity is prospective only, running from the date that such a clarifying public notice is issued.

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^{1/} Petitioners are filing, simultaneously herewith, an Emergency Request for Stay, pursuant to Section 1.43 of the Commission's Rules. 47 C.F.R. §1.43.

reconsideration under Section 1.429 of the FCC's Rules. Even if the Commission believes that it can somehow reconcile the requirements of the Communications Act of 1934, as amended (the "Act")^{2/} and its rules with a freeze on amendments which resolve frequency conflicts, it must issue a new public notice, clarifying that its freeze on the acceptance and processing of amendments which eliminate mutual exclusivity is prospective only, running from the date that such a clarifying public notice is issued. In support hereof, the following is respectfully shown.

I. INTRODUCTION

Since awarding multi-channel 39 GHz licenses to a single applicant in the top 29 markets in September, 1993^{3/} the Commission has endeavored to conserve remaining 39 GHz spectrum for auction. While spectrum conservation is laudable in and of itself, the deprivation of applicant rights for the sole purpose of selling the spectrum at a future date is not. But that is precisely what the Commission has done. The interim retroactive freeze adopted December 15, 1995 represents just the latest in a series of Commission actions pointed toward reaching this improper result.

On September 16, 1994, a Public Notice, Mimeo No. 44787, was released entitled "Common Carrier Bureau Established Policy

^{2/} 47 U.S.C. §§151 et. seq.

^{3/} See, Chairman Hundt Separate Dissenting Statement at 2. Though these grants were initially made subject to such further proceedings as the Commission might initiate, the condition was subsequently removed from the licenses by the Commission without comment or public notice. See, e.g. license of Avant-Garde Telecommunications, Inc.

Governing the Assignment of Frequencies in the 38 GHz and Other Bands to be Used in Conjunction with PCS Support Communications" (hereinafter "September Public Notice"). The September Public Notice advised that:

In Memorandum Opinion and Order, GEN Docket No. 90-314, FCC 94-144, released June 13, 1994, p.15 n.26, the Commission considered and then dismissed the idea of allocating any portion of the 37.6-40.0 GHz frequency band for Personal Communications Services (PCS) support operations. In its decision the Commission stated there is sufficient spectrum available to satisfy PCS support operations. It also stated, however, that it would 'henceforth examine more closely requests for use of the 38 GHz band to ensure that such requests are justified and that the spectrum is used efficiently.'

Id. at 1 (emphasis added). Thus, the Commission decided that "all current and future applicants seeking authority to use any spectrum in conjunction with PCS support communications" were required to provide the Commission with four categories of supplemental information to be associated with their applications. Id. Insofar as public need was concerned, there were three categories of supplemental information described in the September Public Notice: (1) consideration of non-RF solutions; (2) clear and present need; and (3) frequencies and efficiency. The September Public Notice also requested full disclosure regarding the real party in interest owning or controlling the applicant. Id. The problem with the September Public Notice was that, in effect, it barred applicants, such as Petitioners, who wished to offer an array of "last mile" or wireless fiber services, including but not limited to backhaul and link services to PCS and other commercial mobile radio service ("CMRS") carriers, from demonstrating a public need to serve the

CMRS segment of the market. In its 39 GHz Order the Commission now acknowledges that it believes this market segment is potentially very significant.

Specifically, the first category, "consideration of non-RF solutions," required a narrative detailing:

consideration of non-RF solutions to satisfy the communications requirements of the applicant including but not limited to fiber optic cable and wireline, and why such alternatives are technically unacceptable, notwithstanding economics alone.

This category only has relevance to an existing CMRS provider, not to applicants like Petitioners who sought to provide radio link services or "RF solutions" as their business. The second category of information, "clear and present need," required submission of:

a narrative detailing an immediate and real need for the proposed communications. Neither speculation, nor anticipated market development, nor a desire to hold a license in advance of need or for investment purposes will be sufficient. Id. at 2 (emphasis added).

Here again, in repeated oral advice, the FCC's staff interpreted this provision as requiring a demonstration of need by the CMRS provider, not by entities like Petitioners who sought to develop the market by providing 39 Ghz services to CMRS carriers, among other customers.

Lastly, under the "frequencies and efficiency" category, the Commission indicated that "[n]ormally, only one frequency or pair of frequencies will be authorized per application per geographic area. . . . Current applicants must modify their applications accordingly." Id. This last category also imposed very stringent requirements to demonstrate need which were clearly directed to

CMRS providers seeking to apply for 39 GHz spectrum rather than entities such as Petitioners who were seeking the spectrum to develop the so-called wireless fiber or "last mile" services market.

Given the artificial constraints of the September Public Notice -- effectively prohibiting Petitioners from demonstrating public need based on a market segment which the FCC's 39 Ghz Order now acknowledges to be significant -- Petitioners demonstrated multi-channel need responsive to the September Public Notice^{4/} or provided the requested information with new applications as best they could.

For those 39 GHz applicants who attempted to demonstrate a need for multiple channels, the response was no FCC processing. It became apparent that no showing of public need would make the grade and that the Commission was bent on granting only a single channel. Then in the summer of 1995, the Wireless Bureau Telecommunications Bureau (the "Bureau") began to dismiss channel requests beyond a single channel. See, e.g. June 21, 1995 letter from Michael Hayden to Commco, L.L.C. (Attachment 1). The justification provided for this action was "[a] careful review of your application and your communications requirements fails to demonstrate a compelling need or sufficient justification for more than [one channel]." Id.

^{4/} Some applicants chose to amend their applications to reduce to one channel at the same time they responded to the September Public Notice. Other pending applicants submitted detailed information justifying the need for more than one channel and, therefore, did not then amend their requests to one channel at that time.

In the wake of the September Public Notice and the ensuing dismissal letters, Petitioners voluntarily began to file numerous amendments reducing channel requests and resolving frequency conflicts. The latest such effort occurred on November 13, 1995 when Petitioners and other 39 GHz applicants, filed hundreds of minor amendments pursuant to Section 21.23 of the Commission's Rules. 47 C.F.R. §21.23. These minor amendments either reduced proposed service areas and/or reduced pending channel requests. Moreover, certain of these parties filed similar minor amendments on November 22, November 28 and December 8, 1995. These minor amendments were filed with the Commission to reduce channel requests to resolve frequency conflicts with other pending 39 GHz applicants or licensees and did not create any new or additional frequency conflicts. See, 47 C.F.R. §21.31(e)(2).

On November 13, 1995, the Bureau adopted a freeze on the acceptance of applications for licensing new 39 GHz frequency assignments pending Commission action on the petition for rulemaking filed on September 9, 1994 by the Point-to-Point Microwave Section of the Telecommunications Industry Association ("TIA"),^{5/} concerning use of the 37.0 - 38.6 GHz (hereinafter "37 GHz") and 39 GHz bands. Order, DA 95-2341 (hereinafter the "Freeze Order"). The Bureau stated that:

we find that the public interest will be served by not accepting any further applications for licensing new 39 GHz frequency assignments, pending Commission action on the rulemaking petition. Accordingly, effective upon the

^{5/} See also, Public Notice, Report No. 2044, released December 1, 1994, which established RM-8553.

release date of this Order, no applications in the Common Carrier or Operational Fixed Point-to-Point Microwave Radio Services for the 39 GHz band will be accepted for filing.

Freeze Order at 1 (emphasis added). Although the text of the Freeze Order had a release date of November 13, 1995, it is not clear if the document was actually made available to the public on that date, and the Commission was closed the following day. The public was not widely afforded notice of this action until November 20, 1995. See, Daily Digest, Vol. 14, No. 216, dated November 20, 1995.^{6/}

On December 15, 1995, the Commission adopted the 39 GHz Order proposing to amend Parts 1, 2, 21 and 94 of its rules to provide a channeling plan and licensing^{7/} and technical rules for fixed point-to-point microwave operations in the 37 GHz and 39 GHz frequency bands. The Commission also announced its interim 39 GHz licensing policy. 39 GHz Order at ¶¶121-124. Specifically, the Commission stated that:

[w]ith respect to previously filed 39 GHz applications now pending before the Commission, we take the following action. Pending applications will be processed if (1) they were not mutually exclusive with other applications at the time of the [Freeze Order], and (2) the 60-day period for filing mutually exclusive applications expired prior to November 13, 1995.

39 GHz Order at ¶122 (footnotes omitted). The Commission went on to state that:

^{6/} The Freeze Order has not yet been published in the Federal Register.

^{7/} The Commission is proposing to allocate 37 GHz and 39 GHz channels through competitive bidding. 39 GHz Order at ¶¶1-2.

[w]ith respect to all other pending applications (i.e., those that were subject to mutual exclusivity or still within the 60-day period as of November 13), we conclude that processing and disposition should be held in abeyance during the pendency of this proceeding. . . . Therefore, we will not process these applications (or any amendments thereto filed on or after November 13, 1995) at this time . . .

Id. at ¶¶123-124 (emphasis added; citations omitted). Although the text of the 39 GHz Order has a release date of December 15, 1995, it is not clear whether this order was actually released in accordance with the Commission's Rules.^{8/}

II. STANDING

As detailed below, in adopting the interim 39 GHz licensing policy in the 39 GHz Order the Commission violated Congress' statutory prerequisites for competitive bidding, violated its own rules, and engaged in an impermissible retroactive rulemaking. These violations, taken together, have denied Petitioners both their substantive and procedural due process rights. Thus, Petitioners have standing to file the subject Petition for Reconsideration pursuant to Section 1.429 of the Commission's Rules.

^{8/} Section 1.4(b)(1) requires that documents in rulemaking proceedings be printed in the Federal Register to be "released." As of the date of this filing, there has been no such Federal Register publication. 47 C.F.R. §1.4(b)(1). Even assuming that the freeze aspect of the 39 GHz Order was deemed to be a non-rulemaking document, Petitioners were not able to obtain a copy of the 39 GHz Order at the Office of Public Affairs by 5:30 P.M. E.S.T. on December 15, 1995, and thus question whether the document was, in fact, "released" by that date within the meaning of Section 1.4(b)(2) of the Rules. Finally, a copy of the 39 GHz Order was not available through the International Transcription Service ("ITS") until January 11, 1996, when the order was finally disseminated with the FCC's Daily Digest.

Petitioners have been denied the substantive right to amend their pending 39 GHz applications, to resolve mutual exclusivity, pursuant to Section 21.23 of the Commission's Rules. Section 21.23 of the Rules provides that an applicant can amend its application "as a matter of right" prior to designation for hearing, paper evaluation or random selection. 47 C.F.R. §21.23(a)(1). The Commission has noted the fact that "Section 21.23 of [its] Rules is clear in that any application may be amended as a matter of right prior to the designation of such application for hearing." Radio Phone Communications, Inc., 5 R.R.2d 52, 61 (1965); Answerite Professional Telephone Service, 41 R.R.2d 552, 557 (1977). Amendments are effective upon filing, without any specific staff action. Dial-A-Page, Inc., 75 FCC 2d 432, 437 (1980); American Cellular Network Corp. of Nevada, 60 RR2d 1460, 1461, n.3 (Common Car. Bur. 1986).

Just as the right to comparative consideration for timely filed mutually exclusive applicants is "a right of substance,"^{2/} so too must be the right to amend to remove such mutual exclusivity. Petitioners' right to amend coupled with the unambiguous statutory requirements of Section 309(j)(6)(E) of the Act constituted a right of substance which the Commission could not simply take away without notice and comment. It is well settled that rescission of an agency rule -- even if temporary -- is subject to the same standard of review as promulgation of a rule. Public Citizen v. Steed, 733 F.2d 93, 98 (D.C. Cir. 1984). However,

^{2/} Kessler v. FCC, 326 F.2d 673, 688 (1963).

with the release of the 39 GHz Order, the Commission announced, for the first time, that as of November 13, 1995 it stopped processing mutually exclusive applications for new 39 GHz facilities, and amendments thereto. 39 GHz Order, ¶¶123-124.^{10/}

In Neighborhood TV Co., Inc. v. FCC, 742 F.2d 629 (1984), the U.S. Court of Appeals for the D.C. Circuit stated that:

[i]n determining whether a rule is substantive, we must look at its effect on those interests ultimately at stake in the agency proceeding.

Id. at 637. The Court found that an agency's rules are considered substantive where "they [are] the kind calculated to have a substantial effect on the ultimate [agency] decision." Neighborhood TV, at 637 (citing Pickus v. US Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974)). The Commission attempted to characterize its interim 39 GHz licensing policy as a processing freeze (i.e. a measure that would preserve the status quo during its rulemaking proceeding). 39 GHz Order at ¶¶123-124. However, in reality, the Commission's interim 39 GHz licensing policy completely changed the status quo by transforming previously uncontested 39 GHz applications (i.e. applications that had been amended as of right on or after November 13, 1995 to resolve mutual exclusivity) into contested applications. It is impossible to read the 39 GHz Order and the separate statements of the Commissioners

^{10/} Section 1.412 of the rules provides that prior notice of a proposed rulemaking "is ordinarily given by publication of a 'Notice of Proposed Rule Making' in the Federal Register." 47 C.F.R. §1.412. As of the date of this filing, neither the text, nor a summary of, the 39 GHz Order has been published in the Federal Register.

(two of them advocating outright dismissal of all 39 GHz applications) as anything but a calculated effort to preserve as much mutual exclusivity as possible as a prelude to spectrum auctions. Thus, consistent with the Court's holding in Neighborhood TV, the interim 39 GHz policy is a substantive rule because it was "calculated to have a substantial effect" on the Commission's ultimate decision whether to license certain pending uncontested 39 GHz applicants.

The adoption of the interim 39 GHz licensing policy also had the effect of depriving Petitioners of a procedural due process right -- actual notice of the freeze as of November 13, 1995. Although the Commission is afforded latitude in adopting processing freezes during rulemaking proceedings, it is not permitted to undertake such measures without, at a minimum, affording affected parties actual notice of that freeze. Kessler v. F.C.C., 362 F.2d 673, 690 (D.C. Cir. 1963).

Section 0.445(e) of the Commission's Rules provides that:

[n]o person is expected to comply with any requirement or policy of the Commission unless he has actual notice of that requirement or policy or a document stating it has been published as provided in this paragraph.

47 C.F.R. §0.445(e). Petitioners had no such actual notice on November 13 and it is questionable whether the Commission satisfied its own "release" requirements on December 15, 1995. See, note 8 supra.

In Gardner v. FCC, 530 F.2d 1086 (D.C. Cir. 1976) the Court recognized the fact that:

an agency assumes an obligation to assure that the proceeding satisfies the basic procedural requirements set forth in its own regulations and in the Administrative Procedure Act. Whatever would be their standing in a court of law on the merits of the matter before the Commission, participants in an agency action have an undeniable interest in seeing to it that the procedural rights guaranteed them by law are respected. Petitioner comes before this court alleging just such procedural violations, and we therefore conclude that his standing is adequately demonstrated.

Id. at 1091 (citation omitted). Moreover, the Court noted that Section 10(a) of the Administrative Procedure Act, 5 U.S.C. §702 (1970), confers standing to seek judicial review on anyone "suffering legal wrong because of agency action." Thus, a party denied recognized procedural rights, in an action before the FCC, clearly suffers such a legal wrong." Id. at n.20 (citations omitted).

III. ARGUMENTS

A. **The Retroactive Freeze on Amendments to Resolve Mutual Exclusivity Is Prima Facie Inconsistent with Statutory Prerequisites For Competitive Bidding and the Commission's Rules**

As described above, Section 309(j)(6)(E) of the Act explicitly requires the Commission to "continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." 47 U.S.C. §309(j)(6)(E).

There can be no doubt that Congress did not intend for the Commission to construe Section 309(j)(6)(E) in any other manner. For:

the Conference Agreement includes a provision that requires the Commission to continue to use engineering solutions, negotiation, threshold qualifications, service

regulations and other means in order to avoid mutual exclusivity in application and licensing proceedings.

Conference Report, Report No. 213, 103 Cong. 1st Sess., August 4, 1993, at p. 485.

Section 309(j)(7)(B) of the Act prohibits the Commission from deciding to employ auctions "solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding . . ." 47 U.S.C. §309(j)(7)(B). The House Budget Committee, in approving a similar provision, stated:

[t]he licensing process, like the allocation process, should not be influenced by the expectation of federal revenues and the Committee encourages the Commission to avoid mutually exclusive situations, as it is in the public interest to do so.

House Report No. 111, 103 Cong., 1st Sess., May 23, 1993, at pp. 258-259 (emphasis added).

As discussed above, Section 21.23 of the Rules provides that an applicant can amend its application "as a matter of right" prior to designation for hearing, paper evaluation or random selection. 47 C.F.R. §21.23(a)(1). Furthermore, such amendments are effective on filing. Section 21.31(e)(2) specifically encourages the filing of amendments that "resolve[] frequency conflicts with authorized stations or other pending applications," because otherwise the Commission would be required to expend its valuable time and effort on conducting a hearing, comparative evaluation, or random selection procedure to select from among competing applicants. 47 C.F.R. §21.31(e)(2). Similarly, Section 21.29 of the Rules provides that agreements to amend or to dismiss applications, which "resolve[] frequency conflicts with authorized stations or other

pending applications without the creation of new or increased frequency conflicts" do not require prior Commission approval. 47 C.F.R. §21.29. Finally, Section 21.100(d)(1) of the Rules provides:

All applicants and licensees shall cooperate fully and make reasonable efforts to resolve technical problems and conflicts that may inhibit the most effective and efficient use of the radio spectrum . . .

47 C.F.R. §21.100(d)(1).

The interim 39 GHz licensing policy violates Congress' specific mandate for the Commission to avoid mutual exclusivity, and explicitly restricted applicants' rights to amend applications to resolve mutual exclusivity as of November 13, 1995; therefore, it should be vacated. Where Congress' intent is unambiguous, the Commission has an obligation to adhere to it. Southwestern Bell Corp. v. FCC, 43 F.3d 1515 (D.C. Cir. 1995). "Congress enacted the Communications Act and the mandates of the Act are not open to change by the Commission or the courts." Southwestern Bell, at 1519.

If the Commission believes [the Act's] mandates inadequate to the task of regulating the telecommunications industry, in light of changed circumstances, the Commission must take its case to Congress. The Commission may not, instead, ignore congressional directives . . .

Id. In MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985), the Court stated:

[h]owever reasonable the Commission's assessment, we are not at liberty to release the agency from the tie that binds it to the text Congress enacted.

Id. at 1194. Thus, pursuant to Section 706(2)(C) of the Administrative Procedure Act, a reviewing court would, in this instance, "hold unlawful and set aside agency action . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" 5 U.S.C. §706(2)(C) (1976).

It is axiomatic that the Commission has an obligation to adhere to its own rules,^{11/} and to afford affected parties full and explicit notice of changes to those rules on a going forward basis.^{12/} The U.S. Court of Appeals for the D.C. Circuit has reiterated this principle on numerous occasions. See, e.g., Gardner at 1089; Teleprompter Cable Systems v. FCC, 543 F.2d 1279, 1387 (D.C. Cir. 1976). In Reuters, the Court held:

Ad hoc departure from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lies the seeds of destruction of the orderliness and predictability which are the hallmark of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has trusted the regulatory missions of modern life.

Id. at 950-951 (citation omitted). In McElroy, the Court mandated that the FCC provide all parties with full and explicit notice of its rules before going forward with and processing an application for grant. Id. at 1358-1360. The Court also stated:

[i]t is beyond dispute that an applicant should not be placed in a position of going forward with an application without knowledge of requirements established by the Commission and elementary fairness requires clarity of

^{11/} Reuters, Ltd. v. FCC, 781 F.2d 946 (D.C. Cir. 1986).

^{12/} McElroy Electronics Corporation v. FCC, 990 F.2d 1351 (D.C. Cir. 1993)

standards sufficient to apprise an applicant of what is expected.

Id. at 1358 (citing Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1558 (D.C. Cir. 1987)).

With the release of the 39 GHz Order on December 15, 1995, the FCC announced, for the first time, that as of November 13, 1995 it stopped processing 39 GHz mutually exclusive applications (many of which had been pending more than one year), and amendments thereto (many of which were filed to resolve mutual exclusivity pursuant to the Commission's Rules and/or comply with the Commission's one-channel-per-market policy). The obvious purpose of the freeze was first and foremost to preserve this spectrum for competitive bidding^{13/} and secondarily for use by PCS and other CMRS providers.

On the one hand, under the September Public Notice policy, applicants have effectively been precluded from fully demonstrating need for multi-channel grants based on the CMRS market segment. On the other hand, under the 39 GHz Order, they are now precluded from complying with that same stringent policy by means of amending down to a single channel. Despite the fact Petitioners and other 39 GHz applicants and licensees have invested hundreds of thousands, if not millions, of dollars, and significant resources developing their business plans, all in reliance on the FCC's rules, the September Public Notice policy, and the requirements of Section

^{13/} Chairman Hundt and Commissioner Ness went so far as to advocate dismissal of the applications to achieve this purpose, citing a sui generis FCC microwave decision which runs counter to the overwhelming body of judicial precedent. See Hundt and Ness Dissenting Statements to 39 GHz Order.

309(j)(6)(E) of the Act, the Commission has without notice stopped processing their applications and amendments.^{14/} Thus, any application that was mutually exclusive on November 13, despite amendments that were filed on or after that date to resolve that mutual exclusivity, will not be processed by the Commission.

Throughout the entire text of the 39 GHz Order the Commission does not make a single reference to its obligations under Sections 309(j)(6)(E) and 309(j)(7)(B) of the Act, to avoid mutual exclusivity and not to allow the expectation of federal revenue to influence the licensing process. Nor, does the Commission reference the fact that 39 GHz applicants are encouraged by its own rules to resolve mutual exclusivity. Curiously, Commissioner Rachelle B. Chong, though voting to implement an unlawful retroactive freeze on amendments, makes the only reference to the pertinent Congressional mandates in her Separate Statement:

I believe that not processing uncontested applications would be inconsistent with Section 309(j)(6)(E) of the Act, which states that competitive bidding authority does not relieve the Commission of the obligation to take steps to avoid mutual exclusivity in the application and licensing process. If we were to dismiss these applications and require the applicants to refile under auction rules, we would in effect be subjecting them to double jeopardy by allowing a second opportunity for mutually exclusive applications to be filed. This appears to me to be seeking opportunities for mutual exclusivity rather than avoiding them where possible as the plain language of the statute requires.

^{14/} To date, Petitioners and the other 39 GHz parties have successfully negotiated the resolution of hundreds of incidents of mutual exclusivity, without creating any new or additional frequency conflicts. In every instance, these efforts were based upon detailed engineering analyses, extensive frequency interference studies, and meetings with other pending 39 GHz applicants.

Chong Separate Statement at 1 (emphasis added). Petitioners agree.

Congress has specifically required the Commission, in employing its auction authority, to take affirmative steps to avoid mutual exclusivity in the licensing process. Moreover, the Commission's own rules encourage applicants to resolve mutual exclusivity and provide an unqualified right to amend prior to designation for hearing. Thus, because a retroactive freeze on processing amendments to resolve mutual exclusivity is inconsistent with Congressional mandates, the Commission's own rules, and its September Public Notice policy, it must be vacated.

B. The Interim Freeze Constitutes a Form of Impermissible Retroactive Rulemaking

Although the Freeze Order purported only to bar applications for new 39 GHz frequency assignments, effective upon release of the text of that Order, the 39 GHz Order retroactively expanded the Freeze Order to also bar the processing of any pending 39 GHz application that was subject to mutual exclusivity as of November 13, 1995, or any amendments filed on or after November 13, 1995. 39 GHz Order at ¶¶123-124. Therefore, the interim 39 GHz licensing policy is an impermissible exercise in retroactive rulemaking.

Retroactivity occurs where an agency action has the effect of "altering the past legal consequences of past actions." Bowen v. Georgetown University Hospital, 488 US 204, 208, 102 L Ed 2d 492, 109 S Ct 468 (1988). The Supreme Court has held that retroactivity in formal rulemaking proceedings is inherently suspect. Bowen. The presumption against retroactive legislation is deeply rooted in our jurisprudence. Landgraf v. USI Film Products, 511 US ___, 128

L Ed 229, 114 S Ct ____ (1994). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Id. at 252 (footnote omitted); see also General Motors Corp. v. Romein, 503 US __, __, 117 L Ed 2d 328, 112 S Ct 1105 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions").

In adopting its interim 39 GHz licensing policy, the Commission reached back in time to alter applicants' rights enumerated in Sections 21.23, 21.29, 21.31 and 21.100(d) of its Rules as of November 13, 1995. But actual notice of these rule modifications was not afforded to applicants at least until December 15, 1996 or later. Thus, the FCC engaged in impermissible retroactive rulemaking, and its freeze must be modified to set a new effective date.

C. The Commission Failed to Articulate A Reasoned Basis for Imposition of the Freeze On Conflict Resolution Amendments

It is a fundamental principle of administrative law that agencies must articulate the basis on which their decisions are premised. Melody Music, Inc. v. FCC, 345 F.2d 730 (1965); Petroleum Communications, Inc. v. FCC, No. 92-1670, slip op. at 16-17 (D.C. Cir. May 13, 1994). This basis must be simple, clear and reasonable. Id. In Committee for Effective Cellular Rules v.

FCC, 53 F.3d 1309 (D.C. Cir. 1995), the Court

sustain[ed] the Commission's authority to change its standards in a rulemaking, as long as it provides a reasoned explanation for doing so.

Id. at 1317 (emphasis added). The Court made it quite clear, however, that the Commission may not simply ignore its existing rules in the name of conducting further rulemaking proceedings, citing New South Media Corp. v. FCC, 685 F.2d 708, 718 (D.C. Cir. 1982). Id.

In this case, the Commission has not articulated any rational basis for setting aside existing rules or imposing a retroactive freeze on conflict-resolving amendments other than a transparent desire to hold auctions.^{15/} In its 39 GHz Order, the Commission cited to three principles to support adoption of its 39 GHz licensing policy. First, the Commission suggested that the policy might be necessary because some 39 GHz applicants might be speculators. 39 GHz Order at para. 28. In particular, the Commission stated that:

some of the licensees in the 39 GHz band have offered to sell or lease their licenses to broadband PCS operators. These offers suggest that some of these licensees may not have ever intended to directly serve the public, but

^{15/} Though not stated in connection with amendments, the Commission did assert that "resolving mutually exclusive applications requires greater expenditure of Commission resources than processing uncontested applications." 39 GHz Order at ¶123. The fact is, Petitioners' amendments rendered great numbers of their applications uncontested. Moreover, the Commission offers no analysis whatsoever balancing the time and resources necessary to process the amendments in question against the drain on agency resources and likely delay involved in processing multiple new auction applications. Nor does the FCC weigh the inevitable drain on its resources necessary to defend the suspension of its rules, both before the agency and the courts.

rather to hold their own auctions and thereby deprive the public of those revenues.

Id. The Commission did not identify the 39 GHz or broadband PCS licensees it was referring to in this portion of the 39 GHz Order. But even if there were such 39 GHz licensees, nothing in the Commission's rules prohibits common carriers from selling their ownership interests or leasing system capacity for profit. The Commission itself consented to the sale of 30 multi-channel licenses to a new operator at the same time it was eschewing the issuance of further multi-channel grants to potential competitors. If the Commission saw evidence of improper speculation in that sale, it should have dealt with the issue when it arose rather than penalizing an entire industry without any record support. As for leasing capacity, that is an affirmative obligation of all common carriers and should hardly occasion some new FCC concern. Furthermore, both Commissioners Chong and Barrett find, in their Separate Statements, that there is no evidence in the record to support the Commission's assertion that 39 GHz licensees and applicants are speculators. Commissioner Chong noted that:

[a]lthough a large number of 39 GHz applications have been filed within the last six months or so, many applications (if not most) come from entities with significant resources and communications experience. There is no indication of speculative activity by application mills of the type we have seen in some other services.

Chong Separate Statement at 2. Commissioner Barrett stated that: